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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NATURAL HEALTH USA LLC  
et al.,

Plaintiffs and Respondents,

v.

NICHOLAS J. SANDERS,

Defendant and Appellant.

B289306

(Los Angeles County  
Super. Ct. No. BC678718)

APPEAL from order of the Superior Court of Los Angeles County. Dalila Corral Lyons, Judge. Affirmed.

Kenneth G. Eade for Defendant and Appellant.

Czech & Howell and Jonathan A. Howell for Plaintiffs and Respondents.

\* \* \* \* \*

Defendant and appellant Nicholas J. Sanders appeals the denial of his special motion to strike pursuant to Code of Civil Procedure section 425.16 (anti-SLAPP or strategic lawsuit against public participation motion).

We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs and respondents Natural Health USA LLC (Natural Health), Michael Gazzola and Matthew Behdjou sued defendant for libel, alleging he made posts on the website Quora, disparaging their business and claiming they had engaged in dishonest and even criminal conduct. Defendant responded to the complaint by filing an anti-SLAPP motion, contending his comments were protected free speech, statements protected by the litigation privilege and unactionable expressions of his personal opinions. After briefing and oral argument, the trial court denied defendant's motion, finding that defendant's statements constituted protected speech but that plaintiffs had established a probability of success on the merits.

We summarize below the material allegations from the operative complaint and the parties' evidence from the moving and opposition papers.

Mr. Gazzola and Mr. Behdjou jointly own and operate Natural Health and also operate a business called Amazon Secrets, offering clients tips and information about "how to start and operate Amazon.com based businesses." Plaintiffs routinely organize and lead clients on trips to China to assist them with starting internet-based businesses.

In January 2017, defendant's brother signed up as a client of Amazon Secrets for a trip to China to "learn first-hand how to source products" to sell through Amazon-based internet

businesses. Defendant's brother asked plaintiffs if defendant could accompany him on the trip since defendant knew Mandarin Chinese and could help translate during the trip. Plaintiffs agreed.

After the January 2017 trip to China, plaintiffs arranged for defendant to attend another of their planned trips to China in April 2017 to help as a translator and do other work as needed. Plaintiffs arranged for defendant to attend a third trip to China in July 2017 to help with translating for their other clients. Plaintiffs agreed to pay defendant \$2,000 to assist on the July trip.

During the July 2017 trip to China, plaintiffs alleged that defendant "failed to arrive promptly" and caused "other problems," including at one point becoming "extremely intoxicated" in the presence of plaintiffs' other clients.

Before returning home to the United States, plaintiffs gave defendant a check for \$2,000 written on a Natural Health business account with Wells Fargo Bank. Because defendant was going to continue traveling in China and was not returning home with plaintiffs, Mr. Gazzola discussed with defendant the need to send a 1099 form upon defendant's return to the United States.

Sometime around August 10, 2017 while defendant was still in China, he sent the following message to plaintiffs on a messaging app: "I was having trouble cashing in the check in China and was unable to get it to work. Just recently as well, I left it at a hotel and when I went back to them, they said they didn't have it. I still have pictures of it. Is there a way we can do a wire transfer, PayPal or some other method. Sorry about the inconvenience." A copy of the message was attached as exhibit A to plaintiffs' complaint.

About an hour later, defendant sent a second message demanding a response from plaintiffs within 24 hours, followed by a third message shortly thereafter: “I can see you active on we chat. I’m trying to resolve this civilly but it seems you want a problem.” A copy of both messages was attached as exhibit B to the complaint.

Almost a week later, on August 16, 2017, defendant posted a lengthy statement about plaintiffs on the public website Quora. Defendant’s post allegedly garnered “over 17,000 views” by October 2017. A full copy of defendant’s post was attached as exhibit C to the complaint. In the statement, defendant asserted he is someone “who’s actually worked with Mike Gazzola and Matthew Behdjou. I’ve had access to all of their resources because of this . . . I’ll state everything wrong about their program and their business practices.” Defendant then stated that while working with plaintiffs, “this is what I have witnessed,” at which point defendant enumerated various claims, including that plaintiffs “bragg[ed] about committing financial crimes in China,” plaintiffs owed him “more than 2000 US dollars and wrote me a check that was nonredeemable with a bank (it bounced),” and plaintiffs were “dishonest[] with customers on how much hotel fees and other travel fees” would cost for their trips to China.

In support of his motion, defendant filed a declaration stating he was hired to work on behalf of Natural Health for the July 2017 China trip in exchange for a payment of \$2,300, plus other expenses in the amount of \$830. He said he “performed all of my employment duties” but plaintiffs gave him a check in China for \$2,000 that “was unable to be cashed.” Defendant said his posts on Quora while he was still in China only stated his

opinions about whether plaintiffs' business constituted a fraudulent get rich quick scheme. Defendant thereafter saw a post on Quora that was posted by a "fake imposter" making the false claim that he cannot speak Mandarin Chinese and he "believe[d] the fake poster [was] one of the Plaintiffs." Defendant said he was "stranded" in China because plaintiffs "canceled [his] return airplane ticket back to Seattle."

Defendant also said he filed a complaint against plaintiffs in Washington state court upon his return from China to recover the monies he alleged were owed to him in the approximate amount of \$3,100. Defendant said he posted his opinions about plaintiffs on Quora "in contemplation of filing a lawsuit" against plaintiffs. Defendant filed a request for judicial notice containing a copy of his complaint in Washington state court, as well as an alleged printout from plaintiffs' business website.

In opposition to defendant's anti-SLAPP motion, plaintiffs relied on the declaration of Mr. Gazzola which generally denied all of the statements in defendant's post, including that plaintiffs had lied to him or otherwise acted dishonestly with him. Mr. Gazzola further stated the \$2,000 check given to defendant in China was valid, "was backed with more than sufficient funds" and was written from a Natural Health account at Wells Fargo Bank. The check would have been honored if defendant had deposited it to a lawful account or requested cash at a Wells Fargo Bank location, instead of trying to cash it in China. Mr. Gazzola also denied plaintiffs ever committed "financial crimes" in China or bragged about doing so, explaining that they do not generate revenue in China. Rather, plaintiffs earn income from clients who pay them to accompany the clients to China to learn about sourcing products for sale on the internet. Plaintiffs

are not dishonest with clients, and plaintiffs do not even discuss the costs of such trips with clients because the travel expenses for such trips are paid by plaintiffs.

Defendant timely appealed the court's denial of his anti-SLAPP motion. Defendant filed a request in this court seeking judicial notice of a duplicate printout of the portions of plaintiffs' website to replace the illegible copy contained in the clerk's transcript, as well as a copy of a judgment in favor of defendant and against plaintiffs in his Washington state lawsuit. We grant defendant's request for judicial notice of the two documents.

On December 7, 2018, we granted defendant's request for a writ of supersedeas, staying the trial court proceedings pending disposition of this appeal.

## **DISCUSSION**

### **1. Standard of Review**

Our review of a ruling on an anti-SLAPP motion is de novo. "We review the record independently to determine whether the asserted cause of action arises from activity protected under the statute and, if so, whether the plaintiff has shown a probability of prevailing on the merits." (*Stewart v. Rolling Stone, LLC* (2010) 181 Cal.App.4th 664, 675; accord, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

### **2. Applicable Law**

Code of Civil Procedure section 425.16 (section 425.16) was enacted to provide a procedure for the early dismissal of causes of action that infringe on the exercise of the constitutional rights to free speech and to petition for a redress of grievances. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060.) "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition

or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).)

In resolving an anti-SLAPP motion under section 425.16, the court engages in a two-step analysis. The court must first determine whether the moving defendant “has made a threshold showing that the challenged cause of action is one arising from protected activity.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) If the court determines the defendant met this initial burden, “it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Ibid.*) Only those causes of action that satisfy “both prongs” of section 425.16, i.e., arise from protected activity and lack minimal merit, are subject to being stricken under the statute. (*Navellier*, at p. 89.)

### **3. The Trial Court Correctly Determined that Plaintiffs’ Operative Complaint Is Based on Protected Activity.**

The sole cause of action in plaintiffs’ operative complaint is for libel based on defendant’s written statements about plaintiffs posted on the public website Quora.

Section 425.16, subdivision (e) defines an act in furtherance of speech or petitioning activity to include “(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”

We agree with the trial court that plaintiffs' libel claim is based on speech encompassed by section 425.16, subdivision (e). Plaintiffs' contention that defendant's statements constitute commercial speech exempted from protection pursuant to section 425.16, subdivision (c) is without merit. (See, e.g., *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21-22, 30 [commercial speech exemption is narrowly construed].)

**4. Plaintiffs Made a Sufficient Showing of Merit Warranting Denial of Defendant's Motion.**

Defendant contends the trial court erred in finding that plaintiffs met their burden to substantiate their claim under the second prong of section 425.16. We disagree.

To satisfy their burden on the second prong, plaintiffs were required to "state and substantiate a legally sufficient claim." (*Industrial Waste & Debris Box Service, Inc. v. Murphy* (2016) 4 Cal.App.5th 1135, 1148 (*Industrial Waste*); accord, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (*Oasis*).) Plaintiffs had to demonstrate their libel claim was "both legally sufficient and supported by a sufficient prima facie showing of facts" to sustain a judgment in their favor if their evidence was credited. (*Oasis*, at p. 820.) "[C]laims with the requisite minimal merit may proceed." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 385.)

To succeed on a libel cause of action, plaintiffs must show "a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries[.]" (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 145; see also Civ. Code, § 45.) Statements that attribute the commission of a crime, acts of dishonesty or other misconduct reflecting on a

person's integrity are libelous per se and special damages need not be pled or proven. (See generally, 5 Witkin, Summary of Cal. Law (11th ed. 2018) Torts, §§ 638-640, pp. 877-881; CACI No. 1702; see also *Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1133.)

Plaintiffs stated a claim of libel per se based on written statements by defendant posted to a public website which asserted that plaintiffs had "bounced" a check, bragged about having committed "financial crimes" in China, and had otherwise engaged in dishonest acts and made misrepresentations to clients. The post garnered over 17,000 views in a matter of some two months and plaintiffs alleged approximately \$300,000 in damages, including damage to their reputations and lost business.

Mr. Gazzola submitted a declaration denying all of the statements and specifically stating the check to defendant was valid and had been written on a Natural Health account at Wells Fargo Bank containing sufficient funds. Plaintiffs also submitted copies of messages from defendant in which he never said the check had been rejected by Wells Fargo as invalid but rather, that he lost the check at a hotel in China.

Mr. Gazzola's declaration also denied making any misrepresentations to clients about travel expenses in China, stating that such expenses were never discussed with clients at all since plaintiffs pay the travel expenses. Mr. Gazzola expressly denied committing any financial crimes in China or bragging about doing so, stating that plaintiffs did not operate a business in China or generate revenue there, but merely traveled on business trips in the country with clients.

For purposes of review, we accept as true all evidence favorable to plaintiffs and do not compare the weight of the evidence or make credibility determinations. We only evaluate defendant's evidence to determine if it defeats plaintiffs' evidence as a matter of law. (*Oasis, supra*, 51 Cal.4th at p. 820; *Industrial Waste, supra*, 4 Cal.App.5th at p. 1147.)

We reject defendant's argument that plaintiffs' supporting evidence was insufficient and consisted only of generalized denials. Mr. Gazzola's declaration, in addition to denying defendant's statements, provided additional facts demonstrating the factual bases upon which plaintiffs asserted the statements were false. The declaration was therefore not similar to the declaration found wanting in *Industrial Waste, supra*, 4 Cal.App.5th at page 1159.

Further, defendant's contention his statements were merely nonactionable opinions akin to a "rant" is without merit. In his post about plaintiffs, defendant claimed he had personally worked with both Mr. Gazzola and Mr. Behdjou. He claimed an insider's knowledge who had "access to all of their resources" and had personally witnessed the alleged acts of wrongdoing enumerated in his post. (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 431 (*Bently*) ["Internet posts, where the 'tone and content is serious,' where the poster represents himself as 'unbiased' and 'having specialized knowledge,' or where the poster claims his posts are . . . 'alerts,' may indeed be reasonably perceived as containing actionable assertions of fact."].)

The alleged acts of wrongdoing were capable of being proven false, including whether the check for \$2,000 had indeed been "bounced" by Wells Fargo Bank. The phrase "bounced check" in the common vernacular is a well-recognized term

meaning a check written on an account with insufficient funds to cover it which the relevant financial institution will not honor. It is not one merely of hyperbolic or colorful opinion. (*Bently, supra*, 218 Cal.App.4th at p. 427 [“To decide whether a statement expresses or implies a provably false assertion of fact, courts use a totality of the circumstances test.” “The key is not parsing whether a published statement is fact or opinion, but “whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact. ’ ”].)

Finally, we reject defendant’s contention his statements were privileged under the litigation privilege at Civil Code section 47. (See, e.g., *Abuemeira v. Stephens* (2016) 246 Cal.App.4th 1291, 1299 [litigation privilege pertains to statements made in judicial or quasi-judicial proceedings to achieve the objects of litigation and publications to nonparticipants in the action are not covered; “public mudslinging” is not afforded protection by the privilege].) There is no basis in fact or law for defendant’s claim of litigation privilege.

### **DISPOSITION**

The order denying defendant and appellant Nicholas J. Sanders’s special motion to strike is affirmed. Plaintiffs and respondents shall recover their costs of appeal.

The order of December 7, 2018, granting a stay pending disposition of this appeal is hereby lifted.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.